# No. 6167

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
*Appellant,*

vs.

SIDNEY T. BURLEYSON,
*Appellee.*

# BRIEF FOR APPELLANT

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### STATEMENT OF THE CASE

This is an action by the insured for the benefits of a policy of War Risk Insurance issued to him during the year 1918, by the United States Government. The policy lapsed February 1, 1920, for non-payment of premiums. The insured claims that the policy matured because of his becoming permanently and totally disabled prior to the lapse of the policy.

The defense of the government is based upon absence of the disagreement between the Director of the Veterans Bureau and the claimant, which is a condition precedent to suit, and also upon absence of the condition of permanent and total disability prior to the date of lapse.

The appeal is from orders of the District Court denying motions of the defendant for a nonsuit and a directed verdict, entering judgment upon the verdict and for two alleged errors concerning the instructions to the jury.

ASSIGNMENT NO. I

At the close of plaintiff's evidence defendant moved for a nonsuit upon two separate grounds (Tr. p. 43): First, for the failure of plaintiff to present any evidence of a disagreement with the United States Veterans Bureau, as alleged in Paragraph VI of the complaint; and second, upon the ground that the allegations of permanent total disability set forth in Paragraph V of the complaint had failed of proof.

The sole proof offered of the alleged disagreement is the testimony of plaintiff himself (Tr. pp. 19, 25, 37), to the effect that on December 14, 1926, he made a claim for compensation and insurance at San Francisco and was told by some unnamed person whom he understood to be "on Rating Board No. 3" (Tr. p. 19) "that you would have to be totally disabled at the time before you could get it."

No evidence was offered as to the identity of the person so described or of his authority either to receive an insurance claim or to deny the same on behalf of the Director of the Veterans Bureau. Plaintiff himself testified that he has never received any written denial of his insurance claim from the Director of the Veterans Bureau or from anyone else (Tr. p. 37).

No written application for insurance benefits was

made by plaintiff (Tr. p. 37), and he relies entirely upon this oral demand made to some unknown employee of the Veterans Bureau for proof of the disagreement alleged in his complaint. Far from proving the disagreement required by the World War Veterans Act, this evidence does not even establish the actual submission to the Bureau of any claim for insurance benefits. And until an insurance claim is actually submitted to the Veterans Bureau and denied by the Director or by some person authorized by official regulation of the Director to pass upon such claims, there can be no disagreement and a suit upon the policy is prematurely filed.

*Berntsen v. U. S.*, No. 6100 this Court, decided June 16, 1930;

*Manke v. U. S.* )
*Candee v. U. S.*) 38 Fed. (2d) 624.

The second ground of the motion for a nonsuit specifies the failure of plaintiff to present any evidence of the total and permanent disability which the complaint alleges he has suffered. The plaintiff nowhere in his own testimony, either on direct or cross-examination, goes to the extent of saying that he was permanently and totally disabled within the definition of the Act. He testified to being employed continuously at various positions for a period of seven consecutive years, passing successfully various physical examinations of the large corporations who employed him during that time (Tr. pp. 20-25). He received a substantial wage in every instance for his services, which were mostly of a clerical nature.

One doctor testified for the plaintiff. He first saw plaintiff in August, 1927, more than seven years after the lapse of the policy. He testified to being a general practitioner, not an expert on the disease of thrombo engitas obliterance, and that he had never treated such a case before. His diagnosis as well as the treatment he prescribed were based upon the medical history volunteered by the plaintiff himself, and he ventured no opinion as to when the alleged disability commenced (Tr. pp. 27-36).

Four lay witnesses also testified for the plaintiff. The first of these, Harry A. Peschon, testified that plaintiff was a patient at the United States Government Hospital at Palo Alto during part of January and February of 1929, receiving treatment for some ailment unknown to the witnesses (Tr. p. 38).

The next lay witness was S. H. Simpson, who testified that he knew plaintiff for not more than three years prior to the trial of this case in October, 1929; that plaintiff was employed during part of that time as a night clerk at the Hotel Worth; that plaintiff seemed to have trouble with his feet, particularly fallen arches, but worked from eleven o'clock at night to seven o'clock in the morning as night clerk for a period of about one year (Tr. pp. 39, 40).

The next lay witness was F. W. Smith, who testified that plaintiff had been a roomer off and on at the Herald Hotel, conducted by the witness, for eighteen months preceding the trial, and that during much of that time plaintiff was intermittently a patient at the

government hospitals in Palo Alto and San Francisco (Tr. pp. 41, 42).

Plaintiff's next witness was J. A. Brooks, a cigar clerk, who testified that he knew plaintiff for seven years, and that during all of those seven years except the last, plaintiff had been working outside of San Francisco (Tr. pp. 42, 43).

The balance of plaintiff's evidence was documentary in character and consisted of physical examination reports by three physicians setting forth in each instance, a diagnosis of the physical condition of plaintiff.

The examination by Dr. Maynard, a government consulting physician, dated October 13, 1928, gives a diagnosis of "circulatory disturbance strongly suggestive of thrombo angiitis obliterans." (Stipulation on file herein incorporating this exhibit in the record.)

Major S. U. Marietta, a government doctor, examined plaintiff on March 29, 1929, and gave a diagnosis of thrombo-angiitis obliterans both feet, legs, moderately severe. (Same stipulation.)

Dr. Wallace, a private physician examined plaintiff in 1926 and 1928, and gave a diagnosis of chronic eczema of the feet and toes, and fallen arches. (Similar stipulation on file herein incorporating physician's report in record.)

Thus it is seen that a review of the plaintiff's entire evidence fails to disclose any proof of the allegations of Paragraph V of the complaint, as to permanent and

total disability since July 10, 1919, the date of plaintiff's discharge from the service, and prior to the lapse on February 1, 1920.

The testimony of plaintiff shows substantially gainful employment over a period of seven years, with no more loss of time from employment than would be suffered by a person in average good health, following employment which is seasonal or temporary in character. Plaintiff has not presented any evidence of the existence of his alleged permanent and total disability on July 10, 1919, and his own testimony and that of his witnesses utterly refutes his claim of such disability prior to the lapse of the policy on February 1, 1920.

As was said by this Court in the case of

*Barker v. U. S.,* 36 Fed. (2d) 556

"from the facts shown, to hold total disability would be to do violence to any common or reasonable understanding of the meaning of these terms."

The grounds of the motion for nonsuit, to-wit: First, absence of disagreement with the Director of the Veterans Bureau, and second, absence of any proof whatsoever of permanent total disability prior to the lapse of the policy on February 1, 1920, were therefore well taken and the nonsuit should have been granted.

Sec. 581 Code of Civil Procedure of the State of California;
*Manke v. U. S.* )
*Candee v. U. S.*) 38 Fed. (2d) 624;
*Berntsen v. U. S.,* No. 6100 this Court, decided June 16, 1930;
*U. S. v. Barker,* 36 Fed. (2d) 556.

## ASSIGNMENT NO. II

Upon the close of all the evidence in the case, defendant moved for a directed verdict in favor of the defendant (Tr. pp. 73, 74, 75), renewing a similar motion made at the close of plaintiff's evidence (Tr. p. 44). The motion was based upon three grounds:

First, that all of the evidence taken together had not established a prima facie case for the plaintiff and was legally insufficient to sustain a verdict in his favor;

Second, that the evidence showed continuous employment of plaintiff from discharge to the year 1926, and only a partial disability at most thereafter, and that there was no evidence whatsoever of permanent total disability antedating the lapse on February 1, 1920;

Third, that no disagreement with the Director of the Veterans Bureau had been proven.

As to the evidence offered by defendant, four doctors (two Veterans Bureau doctors and two private doctors), who had examined plaintiff at various times from December 15, 1926, to March, 1929, testified that plaintiff during those years was not permanently and totally disabled, was suffering from flat feet only, and was in condition to follow any substantially gainful occupation which he was mentally qualified to pursue. (Tr. pp. 45-63.)

One of the doctors had examined plaintiff for employment with the Southern Pacific Railway Company and another for employment as a cashier and both passed him as physically fit (Tr. pp. 59-63).

Other testimony on behalf of the defendant consisted of records of former employers of the plaintiff, showing his continuous employment by them at various occupations (Tr. pp. 63-66, 68-72), since the date of lapse on February 1, 1920.

An official of a business college testified that plaintiff below attended night school from January 23, 1924, to May 16, 1924, attending school three nights a week, and during that time was absent only six times, which was at a time when he was working during the day (Tr. pp. 67, 68).

The cumulative evidence thus offered by the defendant so far negatives even the possibility of the condition of permanent and total disability alleged by plaintiff below that further comment is unnecessary. The medical testimony as to the physical condition of the appellee subsequent to the lapse of the policy and the undisputed record of employment from 1919 to 1926 were so complete and uncontradicted that to ignore such testimony would be, as this Court said in *Barker v. U. S.*, supra, "to ignore one of the material limitations of the policy."

Upon the motion for a directed verdict the defendant also urged the lack of disagreement with the Director of the Veterans Bureau, which ground it had previously named in its motion for a nonsuit.

For these reasons the motion for a directed verdict should have been granted, and the learned Court below was likewise in error in entering judgment upon the

verdict returned by the jury in favor of plaintiff below upon such plainly insufficient evidence (Assignment V, Tr. p. 97).

ASSIGNMENT NO. III

There was nothing in the evidence indicating that plaintiff below was only able to work spasmodically through heroic efforts on his part, or to the detriment of his health, and the instruction specified in this assignment, based upon this assumption, was properly excepted to as not a correct statement of the law and prejudicial (Tr. p. 86).

ASSIGNMENT NO. IV

The omission of the second paragraph of Defendant's Proposed Instruction No. 8 (Tr. p. 86) deprived the jury of necessary advice by the Court, in properly considering the cumulative evidence of the defendant below as to the long and continuous employment of plaintiff below at various occupations subsequent to the lapse of his policy, and the failure of the Court to give this part of the instruction was properly excepted to (Tr. p. 86).

CONCLUSION

We have here a case with ample precedent within this very Circuit.

As to the lack of disagreement, we need but refer again to

*Berntsen v. U. S.*, supra
*Manke v. U. S.* ) supra
*Candee v. U. S.*)

As to the sufficiency of the evidence we quote:

*U. S. v. Barker*, 36 Fed. (2d) 556
*U. S. v. McPhee*, 31 Fed. (2d) 243
*U. S. v. Hill*, 33 Fed. (2d) 822
*U. S. v. Tracy*, 28 Fed. (2d) 570

in each of which cases the judgment of the trial court was reversed for insufficiency.

It is respectfully submitted that the judgment of the learned court below should be reversed, for the errors indicated in the assignments of appellant.

Respectfully submitted,

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